

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

DANIEL E. OWENS, et al., )  
                                )  
Plaintiffs,                 )  
                                )  
vs.                            )                           CASE NO. 3:09-cv-00479-MJR-DGW  
                                )  
                                )  
APPLE, INC.,                 )  
                                )  
Defendant.                 )

**DEFENDANT APPLE INC.'S MOTION TO DISMISS**

Defendant Apple Inc. (“Apple”) moves this Court under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims of Plaintiffs Daniel E. Owens and Barbara S. Owens (“Plaintiffs”) with prejudice for failure to state a claim upon which relief can be granted. In support of its motion to dismiss, Apple states:

1. Plaintiffs filed this case seeking certification of a nationwide class of individuals who purchased iTunes gift cards. Plaintiffs seek recovery from Apple under theories of breach of contract (Counts I and II), for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count III), and for violation of unspecified consumer protection statutes of other states (Count IV).

2. Plaintiffs’ breach of contract claims fail because: (1) Plaintiffs lack privity with Apple; (2) Plaintiffs did not plead facts demonstrating that a definite and certain contract term was breached; and (3) Plaintiffs suffered no damages. Accordingly, Counts I and II of Plaintiffs’ complaint should be dismissed for failure to state a claim upon which relief can be granted.

3. Plaintiffs’ claim under the Illinois Consumer Fraud and Deceptive Business Practices Act fails because: (1) Plaintiffs failed to allege facts showing that Apple engaged in a

deceptive practice or act; (2) Plaintiffs did not sufficiently plead materiality; (3) Plaintiffs did not sufficiently plead intent; (4) Plaintiffs did not suffer actual damages; and (5) Plaintiffs did not adequately plead proximate causation. Accordingly, Count III of Plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted.

4. Plaintiffs' claim based on unspecified consumer protection statutes of other states fails because Plaintiffs have not alleged facts establishing that the laws of other states apply to their claims and thus Plaintiffs have no standing to prosecute claims under other states' statutes that have no connection to the transaction of which they complain. Accordingly, Count IV of Plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted.

5. Pursuant to Local Rule 7.1(c), a supporting brief accompanies this motion.

FOR RELIEF Defendant Apple Inc. respectfully requests that this Court dismiss each of Plaintiffs' claims with prejudice for failure to state a claim a claim upon which relief can be granted and for any other proper relief.

Respectfully submitted,

**THOMPSON COBURN LLP**

/s/ John W. Rogers

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 26th day of August, 2009, Defendant Apple Inc.'s Motion to Dismiss was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ John W. Rogers \_\_\_\_\_